UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 32

----------x

CONSTELLATION BRANDS U.S. OPERATIONS, INC. D/B/A WOODBRIDGE WINERY,

Respondent Employer,

vs.

CANNERY, WAREHOUSEMEN, FOOD PROCESSORS, DRIVERS AND HELPERS, LOCAL UNION NO. 601, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Charging Party.

----------x

Case No.: 32-CA-186265

RESPONDENT EMPLOYER'S POST REHEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE

KAUFMAN DOLOWICH & VOLUCK, LLP
MICHAEL A. KAUFMAN
MATTHEW R. CAPOBIANCO
Attorneys for Respondent Employer
CONSTELLATION BRANDS U.S. OPERATIONS, INC. d/b/a WOODBRIDGE WINERY
135 Crossways Park Drive, Suite 201
Woodbury, New York 11797
Telephone: (516) 681-1100
Facsimile: (516) 681-1101

Dated: May 30, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

On October 14, 2016, Local Union No. 601 (the "Union") filed a charge against Constellation Brands, U.S. Operations, Inc. ("Constellation") d/b/a Woodbridge Winery ("Woodbridge") alleging unfair labor practices in violation of Section 8(a)(1) of the National Labor Relations Act ("Act" or "NLRA").

On May 3-4, 2017, Administrative Law Judge Ariel L. Sotolongo ("ALJ Sotolongo") conducted a hearing. On December 15, 2017, ALJ Sotolongo requested that Woodbridge and the Union submit statements of position regarding the need to reopen the record to introduce additional evidence in light of the Board's decision in *The Boeing Co.*, 365 NLRB No. 156 (Dec. 14, 2017).

On January 5, 2018, Woodbridge submitted their statement in position arguing that the Board's decision in *Boeing* mandated the reopening of the record to introduce additional evidence concerning two facially neutral non-union employee handbook policies, respectively: (1) the Use of Recording Devices; and (2) the Company Short-Term Incentive Plan. On January 12, 2018, ALJ Sotolongo issued an Order declaring, *inter alia*, the reopening of the record. Following ALJ Sotolongo's Order, the Region announced their decision to withdraw the charge regarding Woodbridge's Use of Recording Devices.

On April 26, 2018, the Board conducted the rehearing. At the rehearing, evidence was introduced by Woodbridge establishing that: (1) the *Boeing* analysis applies because the Short-Term Incentive Plan is facially neutral; (2) Woodbridge's non-union handbook ("Handbook") is trumped by the new hire document ("New Hire Document") that all employees receive at the beginning of their employment; and (3) said policy does not violate employees' Section 7 rights.

On May 1, 2018, the Union announced their withdrawal as the petitioned-for unit's bargaining representative. As a result of ALJ Sotolongo's directives at the conclusion of the rehearing, Respondent submits the instant brief.

RELEVANT FACTS

On October 14, 2016, the Union filed a charge (Charge No. 32-CA-186265) concerning three (3) specific policies contained in Woodbridge's Handbook. The Union erroneously claimed that the following policies were in violation of Section 8(a)(1) of the Act: "Employee Endorsements – Required Disclaimers," "Use of Recording Devices," and "Company Short-Term Incentive Plan.

Following the original hearing, the General Counsel withdrew its allegations against Woodbridge's policies on Employee Endorsements. Similarly, just days before the rehearing, the Union withdrew its allegations against Woodbridge's policies on the Use of Recording Devices. Therefore, the re-opening of the record was on the sole issue of Woodbridge's Short-Term Incentive Plan.

Woodbridge's Short-Term Incentive Plan was signed and acknowledged by all employees at Woodbridge's Acampo, California facility. Said policy has been in place for years, before there was union organizing at Woodbridge. At Constellation's Mission Bell location, a *unionized* facility, a different handbook and onboarding document is distributed to the employees, further demonstrating that different policies are present at Constellation's different facilities.

There is simply no evidence to support the Union's allegations that Woodbridge's Short-Term Incentive Plan is unlawful. Likewise, no testimony was offered at the hearing or rehearing

pertaining to the abovementioned Charge(s), particularly the Company Short-Term Incentive Plan. *See* Transcript generally.

As set forth herein, the General Counsel failed to establish that Woodbridge's Short-Term Incentive Plan violates Section 8(a)(1) or any other provision of the Act. Thus, the Complaint should be dismissed in its entirety.

LEGAL ARGUMENT

I. THE NEW STANDARD ARTICULATED IN *BOEING* MANDATES THAT THE SHORT-TERM INCENTIVE PLAN CHARGE BE DISMISSED

On December 14, 2017, the Board in B*oeing* overruled the *Lutheran Heritage* standard regarding facially neutral handbook policies. More specifically, in *Boeing*, the Board stated in relevant part, "[i]n cases in which one or more facially neutral policies, rules, or handbook provisions are at issue that, when reasonably interpreted, would interfere with Section 7 Rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRB rights, and (ii) legitimate justifications associated with the requirements." *Boeing* at sl.op. 14.

Initially, it should be noted that Woodbridge's Short-Term Incentive Plan is facially neutral. The policy was not adopted in response to NLRA protected activity, and it has not been applied to restrict activity protected by Section 7 of the Act. The Short-Term Incentive Plan has very little, if any, impact on employees' Section 7 Rights. The only reason the policy is even in question is because the Union filed over ten meritless ULP's (two were withdrawn in this hearing and there are an additional seven claims that revolve around Constellation's refusal to bargain over an inappropriate unit which is now moot as a result of the Union's withdrawal of the petition). All Woodbridge employees have been receiving this benefit since the Union was

certified by the Board in 2015.[1] Further, Woodbridge's important justifications for implementing the policy severely outweigh the risk that the policy "has a tendency" to infringe on employees' Section 7 rights.

The General Counsel has the burden to prove that a rule or policy violates the Act. Simply stated, the General Counsel has not met such burden. Under the test articulated in *Boeing*, the policy at issue does not violate the Act.

II. WOODBRIDGE'S SHORT-TERM INCENTIVE PLAN DOES NOT UNLAWFULLY RESTRICT EMPLOYEES' SECTION 7 RIGHTS

It is well settled that an employer need not propose the same wages or benefits to union represented employees that it offers to unrepresented employees. *Covanta Energy Corporation and Covanta Semass LLC*, 356 N.L.R.B. 706, 718. Moreover, the mere fact that different offers are made or that different benefits are provided does not, standing alone, demonstrate unlawful motive. *Sun Transport*, 340 N.L.R.B. 70, 72. Absent unlawful motive…an employer may grant benefits to unrepresented employees that is does not grant to its union represented employees. *Empire Pacific Industries*, 257 N.L.R.B. 1425.

The Union charged that Woodbridge violated the Act because Union employees are excluded from the Short-Term Incentive Plan. All employees, including those in the now debunked petitioned-for unit, are eligible for and have received Woodbridge's Short-Term Incentive Plan. Constellation's union members (at other Constellation owed facilities, including Mission Bell) receive compensation, bonuses and benefits pursuant to the terms and conditions expressly bargained for in their collective bargaining agreements – which could include or exclude a Short-Term Incentive Plan.

[1] Manuel Chavez, the known lead Union organizer, received this benefit both before and after the Union's presence at Woodbridge's facility.

As such, Woodbridge's Short-Term Incentive Plan does not violate the Act. The Union's deficient and conclusory allegations have no merit and should be dismissed as a matter of law.

III. THE SHORT-TERM INCENTIVE PLAN CONTAINED IN WOODBRIDGE'S HANDBOOK IS TRUMPED BY THE HIRING LETTER THAT ALL EMPLOYEES RECEIVE AT THE COMMENCEMENT OF EMPLOYMENT

All employees at Woodbridge, including the employees in the now debunked petitioned-for unit, are eligible for the bonus program. At the time of hire, every employee signs the New Hire Document which outlines the Company Short-Term Incentive Plan. *See* Transcript Exhibit R-1, R-2.

As indicated on page 6 of Woodbridge's Handbook, supplemental documents, including the New Hire Document, trumps language and policies contained within the Handbook. Specifically, the Handbook states in relevant part:

> Some of the subjects described here are covered in greater detail in separate policy statements and plan documents. Employees should refer to those policy statement and plan documents for specific information, since this handbook only briefly summaries those policies and benefits. In the event of any contradiction between this handbook and an applicable policy statement or plan document (*i.e.*, New Hire Document), the policy statement or plan document controls

There is also a similar disclaimer on the Handbook receipt.[2] Notably, the New Hire Document makes no mention of union or non-union eligibility, but instead, bears the message that all new hires, regardless of union affiliation, are eligible for the Short-Term Incentive Plan. As a result, the New Hire Document is controlling, and further establishes that Woodbridge's

[2] "I further understand that some of the statements in this Handbook are summaries of more detailed policies, and that it is my responsibility to read and familiarize myself with the full policies, as referenced in the Handbook."

policy is facially neutral,[3] and not in violation of the Act. *See Longy Sch.*, 2015 NLRB LEXIS 6, *9, 202 L.R.R.M. 1353 (N.L.R.B. January 7, 2015) (agreeing that "in the event of a conflict between the [h]andbook and any written contract, the terms of the contract will apply"). Further, Constellation's Mission Bell location, a unionized facility, provides a different handbook and a different onboarding/new hire document, further establishing that different policies are present at different Constellation facilities. *See* Transcript Exhibit(s) R-3, R-4.

IV. GENERAL COUNSEL'S REQUEST FOR A NATIONWIDE REMEDY IS INAPPROPRIATE AND INCONSISTENT WITH LONG-STANDING BOARD PRECEDENT

Assuming, *arguendo*, that Woodbridge's Short-Term Incentive Plan is in violation of the Act, which it is not, General Counsel has requested that the Board order a "nationwide remedy" requiring Constellation to rescind said policy at all of their facilities in the United States. General Counsel further requests that the Board order Woodbridge to notify all of their employees working in the United States that the provision has been rescinded/revised. This request is absurd and unprecedented. Neither the General Counsel nor the Union offered any evidence supporting their request for a nationwide remedy and there was no evidence presented that this is a nationwide policy.

A *normal* Board remedy requires the respondent-employer to rescind the unlawful policy in question and post notice at the facility where violations of the Act were allegedly committed (Woodbridge's Acampo, California facility). *Overnite Transportation Company*, 1999 NLRB LEXIS 109 (1999). Requiring a respondent-employer to rescind a policy and post a notice on a

[3] Much like the Fourteenth Amendment, "It is necessary that one claiming harm through the disparate or disproportionate impact of a facially neutral law prove intent or motive to discriminate. [A] law, neutral on its face and serving ends otherwise within the power of government to pursue, is not invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another." U.S. Const. amend. 14. This policy was in place prior to any union organizing at Woodbridge. All employees including the inappropriate micro-unit, continually received this benefit. As such, the Board cannot show intent or actual harm. Further, the Union has withdrawn their petition and there was no evidence that this policy, which is trumped by the New Hire Document, was impeding any individuals' Section 7 Rights. Therefore, this ULP is meritless.

"nationwide" basis is considered an "extraordinary remedy." *Id.* Thus, the General Counsel's request is "extraordinary," and should not be entertained by the Board.

Though there is no per se test, when the Board is deciding whether a nationwide remedy is appropriate, the Board looks to several factors, including: (1) whether respondent's alleged conduct is widespread/took place at multiple locations or is isolated/contained; (2) whether respondent's alleged conduct is egregious; (3) the relationship between the facilities being charged and the non-charged facilities; (4) whether respondent has had numerous unfair labor practice charges filed against them in recent years; and (5) whether the events leading up to the alleged violation had connection to a central management team.

First, Woodbridge's alleged conduct is certainly not widespread, as the record evidence establishes that this policy is only contained at Woodbridge and a couple of non-union facilities. Neither General Counsel nor the Union proved that the allegations were anything but isolated to Woodbridge's Acampo facility. **Second**, Woodbridge's alleged actions are not "egregious," as numerous employees, including the lead organizer Manuel Chavez and those in the petitioned-for unit, received the benefit under the policy during their entire tenure. **Third**, pursuing a nationwide remedy against other Constellation-owned facilities would be improper as their relationship to Woodbridge was not litigated. Constellation's facilities operate independently, and share very little, if any, employees, supplies or general resources. Lastly, Constellation has facilities that have different handbooks and policies.

Fourth, the only unfair labor practices charges filed against Woodbridge all revolved around the Union's organizing effort of an improper micro-unit and none of them have validity. Notably, the Union has withdrawn their petition in the underlying case. Additionally, no prior charges concerning Woodbridge's Short-Term Incentive Plan have ever been filed, including

internally (at Woodbridge) and at the Region. **Lastly**, the "events" leading up to the alleged violation did not have any sort of connection to a "central management team." The policy is question was developed years ago, and has been in place without issue ever since.[4]

Finally, and most importantly, none of Constellation's other facilities, including Mission Bell and Dunnewood were ever put on requisite notice[5] (or served) of the claims alleged herein – therefore denying each facility their due process rights under the law.

If the Board concludes, despite all of Woodbridge's proffered evidence and witness testimony, that its Short-Term Incentive Plan is in violation of the Act, the Board's remedy should be strictly limited to Woodbridge's Acampo, California facility.

CONCLUSION

Based upon the foregoing, General Counsel failed to meet their required burden. The record evidence clearly demonstrates that Woodbridge did not violate Section 8(a)(1) or any other provision of the Act. Accordingly, Woodbridge respectfully requests that the Board dismiss the Complaint in its entirety.

Respectfully submitted,
KAUFMAN DOLOWICH & VOLUCK, LLP

Michael A. Kaufman, Esq.
Matthew R. Capobianco, Esq.
Attorneys for Respondent Employer

DATED: May 30, 2018

[4] A nationwide remedy is also inappropriate as the Union withdrew their petition to be the bargaining representative of the petitioned-for unit. Therefore, the Union's claims should be dismissed, as the Union no longer has standing.
[5] The only entity that was served was Woodbridge's Acampo, California facility.

STATEMENT OF SERVICE

I hereby certify and declare under penalty of perjury, under the laws of the United States of America and the State of California, that a copy of the RESPONDENT EMPLOYER'S POST REHEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE was served today, May 30, 2018, on the following parties or persons via Facsimile and Federal Express:

Gary Shinners
Executive Secretary
National Labor Relations Board
1015 Half Street S.E.
Washington, D.C. 20570
Fax: (202) 273-4270

Ken Ko, Esq.
Lelia Gomez, Esq.
National Labor Relations Board
Region 32
1301 Clay Street
Room 300-N
Oakland, CA 94612
Phone: (510) 637-3300
Fax: (510) 637-3315
On behalf of General Counsel for Region 32

Robert Bonsall, Esq.
Stephanie Platenkamp, Esq.
Beeson Tayer & Bodine, APC
520 Capitol Mall, Suite 300
Sacramento, CA 95814
Phone: (916) 325-2100
Fax: (916) 325-2120
Counsel of Record for Local Union No. 601

KAUFMAN DOLOWICH & VOLUCK, LLP

By: _____

Michael A. Kaufman, Esq.
Matthew R. Capobianco, Esq.
135 Crossways Park Drive, Suite 201
Woodbury, NY 11797
Phone: (516) 681-1100
Fax: (516) 681-1101
Attorneys for Respondent Employer

4840-8876-1190, v. 1